

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT BINGHAM,

Defendant-Appellant.

UNPUBLISHED

January 15, 2004

No. 243619

Wayne Circuit Court

LC No. 01-005178

Before: Hoekstra, P.J., and Sawyer and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of first-degree murder, MCL 750.316. The trial court sentenced defendant to life in prison without parole. Defendant now appeals as of right. We affirm but remand for correction of the presentence investigation report.

This case arises out of the brutal murder of the thirteen-year-old victim. Defendant had been living with the victim's mother, and the victim and her brother, prior to the murder. On the day before the murder, defendant moved out of the home and left his keys. On the day of the murder, the victim stayed home from school because she felt ill. Defendant admitted that he went to the home twice that day, once he went in through an unlocked window to retrieve a tool, and the second time he went into the garage to get a gas can. He denied, however, ever seeing the victim. When the victim's ten-year-old brother returned home from school he found the victim on the floor in the living room partially wrapped in a blanket. Although he attempted to wake the victim, she would not awaken and he assumed she was asleep. When the victim's mother arrived home later that evening, she found the victim lying cold and unresponsive on the floor. The victim was wrapped in a blanket from the waist down and was heavily bleeding. An autopsy revealed that the victim had been stabbed multiple times and her neck was cut through the left jugular vein. Further tests also revealed semen on the victim's body.

On appeal, defendant raises two claims of ineffective assistance of counsel. Because defendant failed to preserve this issue through the proper motion and evidentiary hearing below, we are limited to a review of the existing record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001), citing *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant must also demonstrate a reasonable probability that, but for counsel's errors, the result

of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. *Rodgers, supra*, citing *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). In doing so, defendant must overcome the strong presumption that counsel's actions constituted sound trial strategy. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant's first claim of ineffective assistance of counsel is based on trial counsel's failure to challenge a juror for cause. The questioning of this particular juror went as follows:

The Court. Have you served on a jury before?

Juror 1. Yes

The Court. When, approximately?

Juror 1. Probably nine or ten years ago.

The Court. What type of case, do you remember?

Juror 1. One was, when a gun is hidden. I forgot what you call it. Concealed weapon, I guess, and the other one was medical, people were suing the hospital.

The Court. Civil case.

Juror 1. Yes.

The Court. Anything about either of those situations that would interfere with you being impartial if you selected to serve as a juror today?

Juror 1. I don't think so.

The Court. Now, were you able to hear all of the questions that the attorneys and the Court asked the other jurors?

Juror 1. Yes.

The Court. Is there anything at all about anything that you would offer by way of responses to any of those questions that would make you feel that you could not be fair and impartial if you were selected?

Juror 1. Just anything about blood and guns, I can't put it any other way.

The Court. You mean if there were some gruesome pictures that might upset you?

Juror 1. Exactly.

The Court. Anything else?

Juror 1. Well, I have a 13-year-old granddaughter and two 14-year old granddaughters.

The Court. Granddaughters?

Juror 1. Yes.

The Court. Would that make a difference insofar as you being fair and impartial if you were selected?

Juror 1. Possibly.

The Court. How is that?

Juror 1. I just don't know if I could go through it all.

Defendant argues that based on the above exchange, there was no trial strategy in seating this juror.

We begin by noting that an attorney's decision relating to the selection of jurors generally involves a matter of trial strategy that we normally decline to evaluate with the benefit of hindsight. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). Moreover, it is an extremely rare, if not nonexistent, case where a defense counsel's failure to challenge a juror may form the basis for a claim of ineffective assistance of counsel. *People v Robinson*, 154 Mich App 92, 94; 397 NW2d 229 (1986).

Here, defendant has failed to show that counsel's performance was either deficient or prejudicial. A reading of the exchange between the court and juror during voir dire shows that rather than demonstrating an inability to appear impartial, the juror instead demonstrated more of a reluctance to want to go through trial because of the nature of the case. "Defense counsel may have correctly assumed that [a] challenge[] for cause would be properly denied and that [an] unsuccessful challenge[] for cause would not be viewed favorably by the jury." *Robinson*, *supra*. Thus, defense counsel's decision not to challenge the juror for cause was not objectively unreasonable. We are not convinced that had defense counsel challenged this juror the outcome of the proceedings would have been different, nor are we convinced that the proceedings were fundamentally unfair or unreliable.

Defendant's second claim of ineffective assistance of counsel is based on trial counsel's failure to challenge the chain of evidence of defendant's blood sample that the police used for comparison with DNA obtained from the victim's body.

The admission of real evidence does not require a perfect chain of custody. *People v White*, 208 Mich App 126, 130; 527 NW2d 34 (1994). "Any deficiency in the chain of custody goes to the weight of the evidence rather than its admissibility once the proffered evidence is shown to a reasonable degree of certainty to be what its proponent claims." *Id.* at 130-131.

The officer in charge of this case, Barbara Simon, testified that she took defendant to Herman Kiefer Hospital to have his blood drawn on April 9, 2001, and that she took the sample back to the Homicide Department and gave it to Investigator James Fisher. However, a consent form for the blood draw was admitted into evidence, which was signed by defendant on April 7, 2001, indicating it was an Officer Marian Stevenson who took defendant to Detroit Receiving Hospital to have his blood drawn. Officer Stevenson testified that she and Simon were supposed to take defendant to get his blood drawn, but Simon got called into an interview, so Stevenson took defendant herself. Although it was normal protocol to take suspects to Herman Kiefer Hospital for blood draws, Stevenson was new to the unit and instead took defendant to Detroit Receiving Hospital. Stevenson testified that she was present when the blood sample was drawn and she placed the sample in a tube and took it back to Homicide where she placed it in the cooler. She could not take it directly to the lab because the lab was closed for the weekend. Investigator Fisher testified that he placed the blood on evidence tag 627555 and transported it to the Forensics Services Division for testing and comparison on April 9, 2001. The blood sample was analyzed by Paula Lytle of the Detroit Police Crime Lab and compared with samples obtained from the victim's body. The sperm cells found on the victim's body matched defendant's DNA with the odds of coincidental match estimated to being one in three billion.

Defendant's contention that trial counsel was ineffective for failing to challenge the chain of custody of the blood sample is without merit. While Officer Simon originally testified that it was she who took defendant to have his blood drawn at Herman Kiefer, Officer Stevenson eventually testified that it was actually she who took defendant for the blood draw at Detroit Receiving. The consent form signed by defendant reflects that he was being taken to Detroit Receiving and it was signed by Officer Stevenson. Officer Stevenson testified that she put the sample in a cooler at the department headquarters, which was in view of officers at all times. There is no question that Investigator Fisher took the sample to the crime lab for testing and it was tested by Lytle. Defense counsel sufficiently cross-examined Fisher with regard to whether he was present when the blood sample was drawn and Fisher could not remember whether he was there or not. Defense counsel also sufficiently cross-examined Simon and Stevenson to highlight the ambiguities in their testimony. Moreover, during closing arguments defense counsel adequately highlighted the deficiencies in the chain of evidence and gave alternative reasons for why the DNA from the blood sample matched the semen found on the victim's body. While there are some deficiencies and ambiguities regarding who took defendant to have his blood drawn, there is no evidence that the blood actually tested was not defendant's. Defense counsel sufficiently questioned the witnesses with regard to their involvement with the blood sample and whether the sample taken to the crime lab was actually defendant's. The deficiency in the chain of evidence goes toward the weight of the evidence, not its admissibility. Under the circumstances, defense counsel was not ineffective for failing to further challenge the chain of evidence.

Defendant's final issue on appeal regards his presentence investigation report. At sentencing, defense counsel challenged information in the report that stated that defendant had a prior felony conviction. In light of the mandatory life sentence to be imposed, the prosecution stipulated to the deletion of the challenged information. The trial court agreed that the reference to the prior felony conviction should be deleted. On appeal, the prosecution agrees that if the information has not already been deleted, it should be deleted. From the record, it appears the

information was not deleted. Thus, remand is necessary for the trial court to delete any reference to the prior felony conviction in the presentence investigation report.

Affirmed, but remanded for the ministerial task of correction of the presentence investigation report. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Hilda R. Gage